42314-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

State of Washington

v.

Charlie W. Dodd

42314-6

On Appeal from the Superior Court of Cowlitz County

Cause No. 10-1-01133-9

The Honorable Michael H. Evans

BRIEF OF APPELLANT

Jordan B. McCabe, WSBA No. 27211
For Appellant, Charlie W. Dodd

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II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignment of Error

1. The trial court erroneously applied the insanity defense statute, resulting in pervasive violations of the Sixth Amendment and. Const. art. 1, § 22

2. The failure to distinguish between a plea of not guilty by reason of insanity and diminished capacity denied Appellant the opportunity to present a complete defense.

3. Appellant received ineffective assistance of counsel.

4. Pretrial Reports by submitted by experts under the insanity defense statute exceeded the scope of expertise and usurped the role of the jury to adjudicate a claim of diminished capacity.

5. The erroneous reliance upon overly broad opinions by psychological experts constructively denied Appellant's Sixth Amendment and art. 1, § 22 right to confront the witnesses against him.

6. The trial court erroneously excluded admissible defense evidence.

7. The jury should have been instructed on the lesser inluded offense of reckless endangerment.

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B. Issues Underlying the Assignment of Error

1. Can Appellant's Due Process Challenges be Raised For the First time on Appeal?

2. Did the trial court violate due process by erroneously invoking the insanity defense statute?

3. Did sufficient foundation support a defense of diminished capacity?

4. Did conflating an insanity plea and a defense of diminished capacity prevent Appellant from presenting a complete defense?

5. Did the suppression of admissible evidence prevent Appellant from presenting a complete defense?

6. The Psychology Experts' Reports Invaded the Province of the Jury

7. Appellant Received Ineffective Assistance of Counsel

8. Was the insanity defense error so pervasively damaging as to constitute a structural error?

9. Did the essentially dispositive impact of the erroneous experts' reports constructively constitute a Confrontation Clause violation?

10. Does the failure to instruct the jury on the lesser included offense of reckless endangerment entitle Appellant to a new trial?

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III. SUMMARY OF THE CASE

Appellant, Charlie W. Dodd, was charged with three counts of first degree assault with firearm enhancements after a stand-off with police during which he fired a volley of three shots in the direction of a SWAT vehicle. Mr. Dodd pleaded not guilty based upon a general denial in which he claimed that his capacity to form the requisite intent was diminished under the particular circumstances alleged. But the trial judge, prosecutor, and defense counsel erroneously treated this from the outset as an insanity defense.

This error permeated the entire proceedings and deprived Mr. Dodd of any possibility of a fair trial. It shifted the burden from the State to Dodd to prove the essential element of his mental state, caused his counsel to abandon the diminished capacity defense despite strong foundational mental impairment evidence, and foreclosed Dodd's opportunity to present a complete defense. His counsel also failed to request an instruction on the lesser offense of reckless endangerment which would have eliminated the three consecutive firearm enhancements that extended Dodd's sentence from one year to ten.

Mr. Dodd asks this Court to hold that the outcome of this prosecution is a manifest injustice and to grant him a new trial.

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IV. STATEMENT OF THE CASE

On November 7, 2010, Cowlitz County Sheriff's deputies responded to a report of a suicidal man with a gun at 5851 Rose Valley Road in Kelso. RP 52, 70, 101, 164, 232, 237, 249, 263. The man had already fired some shots. RP 237, 249. When the police arrived, he was pointing the gun at a major artery and threatening to harm himself. He repeatedly implored the officers to shoot him. RP 232, 246. That man was Appellant, Charlie W. Dodd.

The crisis was precipitated by unbearable noise from the unrelenting, unmuffled racket of dirt bikes being raced on the neighboring property. Mr. Dodd's companion, Barbara Nicholas, could hardly bear the noise herself. RP 54-55. It was excruciating for Dodd, who suffered from severe tinnitus (ringing in the ears), a result of his combat service in Vietnam. RP 13; TR 3.[1] Dr. Trowbridge personally observed the extreme noise-reaction every time a jail door slammed during the examination. TR 5. Ms. Nicholas called 911 because Dodd was armed and threatening to harm himself. RP 11, 59. She was concerned for Dodd, not for herself. RP 66. Nicholas said that, after 23 years of sobriety, Dodd had gotten falling-down drunk in hopes this would give him the courage to pull the trigger and end his own life. RP 57, 59, 60. At the suggestion of the

[1] Report of defense psychologist Dr. Brett Trowbridge (TR), at 1, Supp CP.

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police, Ms. Nicholas left the property and went to a neighbor's house. RP 62.

When the police arrived, Dodd was in a shed near the trailer where he and Nicholas lived. They heard numerous shots. RP 72, 76. The police witnesses corroborated that Dodd was stumbling and falling down. RP 77. Deputy Jordan Spencer witnessed Dodd firing several shots, but did not think Dodd was firing at him. He thought Dodd was too drunk even to know the police were there. He was just "cranking off rounds." RP 78. At one point, Dodd fell on his back out in the open and just stayed that way. He propped himself up while he emptied and reloaded the gun several times. RP 77, 79. Dodd then managed to get to his feet and stagger back inside the shed, where he fired more rounds. Then he went into the trailer. RP 79. Spencer estimated that Dodd fired around 50 rounds, including 15 or 20 from inside the shed. RP 80. Dodd kept repeating that he was not going to hurt anybody. RP 135, 136, 139.

In all, between 23 and 30 officers converged on the scene. RP 89. The stand-off dragged on from two in the afternoon until 7:30 or 8:00 p.m. RP 90. At around 2:00 p.m., it began to rain, reducing visibility. RP 266.

At some point, a SWAT vehicle arrived and pulled up about 60 yards from the trailer. RP 151. This was an armored bank truck with bullet-proof windows. RP 196. At some point, the truck was moved back

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because a tree was in the way. RP 177. Three officers and a dog were in the SWAT truck. RP 150. The dog was not used. RP 176. The SWAT team had been told that Dodd was suicidal. RP 164.

SWAT Officer Brad Bauman announced over a loudspeaker that Dodd should surrender. RP 153. In response, according to Bauman, a window of the trailer opened up, a hand extended out of it, three quick shots were fired in the direction of the armored vehicle, and then the hand was withdrawn. RP 155, 157, 167. The vehicle was not hit. RP 160, 183, 193. SWAT officer Mark Langlois also testified that Dodd stuck his hand out of the window of the trailer. RP 181. The hand came out of the window and pivoted toward the truck before firing off a volley of three shots. RP 182. The third SWAT team member, Tim Deisher, also thought that he saw an object later identified as a pistol come out of the window, point in their direction and fire three shots. RP 205. The shots were fired in a rapid three-shot volley. RP 214. He assumed Dodd was shooting at them. RP 206. Another officer, Mark Johnson, observing from a different vantage point, first testified that Dodd leaned out of the window then ducked back in. RP 270. After examining the window, however, Johnson realized that it was fully screened. The screen had bullet holes in it, consistent with shots having been fired through it from inside the trailer. RP 295-96, 305. Johnson then backtracked on his earlier testimony and

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said the shooter could not have reached out through the window because of the screen. RP 304-05.

Following protocol, the SWAT team did not return fire, because they did not perceive the situation as life-threatening. RP 158. After observing Dodd, Officer Bauman affirmatively concluded he was not a threat. RP 158. The officers continued trying to coax Dodd out of the trailer for another two hours, during which no further shots were fired. Eventually, Dodd came out. RP 160, 165. He greeted the officers with profanities and was taken into custody. RP 209, 246. Dodd was bean-bagged a couple of times before finally being floored with a taser. RP 229-230. He again asked the officers to shoot him. RP 246. Dodd was calm, however, within a minute of the arrest. RP 247.

On February 16, 2011, the trial court, on its own motion, instructed Western State Hospital that Dodd had pleaded not guilty by reason of insanity and requested an evaluation pursuant to the insanity defense provisions of RCW 10.77.030 and RCW 10.77.060, to determine his "capacity to form intent to commit the crime."

Staff psychologist, Dr. Marilyn Ronnei, performed the court-ordered evaluation. CP 7, 8-21.[2] Dr. Ronnei diagnosed Mr. Dodd with Posttraumatic Stress Disorder (PTSD); Recurrent Major Depression;

[2] Both counsel referred to Dr. Ronnei as the "State's doctor." RP 1-2.

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Alcohol Dependence, controlled; Personality Disorder Not Otherwise Specified; and Chronic Pain. CP 15. He manifested "active symptoms of major mental illness and impulsivity. CP 20.

Brett Trowbridge, the defense expert, examined Dodd on March 6 and submitted a report to defense counsel on April 6, 2011. TR 1; RP 2. On June 13, 2011, the court entered an order authorizing this evaluation, also under the insanity defense provisions of chapter RCW 10.77. CP 75. The court characterized the purpose of the evaluation as "to determine whether or not [Dodd] is competent and/or responsible to stand trial" pursuant to RCW 10.77.020. CP 75. Dr. Trowbridge reported:

> In my opinion, Mr. Dodd suffers from PTSD as well as bi-polar disorder, currently depressed. It appears that he has been suicidal many times in his life and it appears that he was suicidal on the day of the alleged incident. During the incident he was highly intoxicated, although he had not had a drink since 1984."

TR 5. The prosecutor himself so characterized the Trowbridge findings during pretrial proceedings: "Dr. Trowbridge indicates that in his opinion somehow the root cause of all these items was Mr. Dodd's preexisting mental illness or conditions." RP 12. Dr. Trowbridge further reported that Mr. Dodd had been on permanent disability since the age of 59 because of chronic mental problems. and that he is particularly sensitive to noise because of his constant tinnitus. TR 1. Trowbridge also reported

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that Dodd had been diagnosed by the VA with PTSD due to his combat experience and also bi-polar disorder. TR 2. And that he was "especially sensitive to noise because of his constant tinnitus." TR 1. Dodd had also told Trowbridge about a suicide attempt in 1984 after a four-day drunk, and that, until this incident, had not had a drink since. TR 4.

In addition to their mental health evaluations, however, both experts purported to weigh the factual evidence presented to them in the form of varying degrees of hearsay. Trowbridge: TR 1-2; Ronnei, CP 8-9; 16-17. Then, each concluded that Mr. Dodd had been capable, on November 7, 2010, of acting purposefully and with intent. Trowbridge: "Mr. Dodd's behavior during the time of the incident does not suggest an ability [sic] to form the requisite intent for the crime of Assault in the First Degree." RP 12. Ronnei: "[N]one of the data suggested that Mr. Dodd lacked the capacity to form the requisite level of intent for Assault in the First Degree[.]" CP 20.

Based on these reports, defense counsel decided to withdraw the diminished capacity defense. RP 5, 13. According to defense counsel, the experts had determined that Dodd had "underlying issues" but were not prepared to testify that he suffered from diminished capacity at the time of the alleged assaults. RP 5.

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Once the diminished capacity defense was withdrawn, the prosecutor argued that Mr. Dodd's undisputed mental and emotional illness constituted merely "background or historical conditions." As such, the State successfully moved in limine to exclude any reference to any of them, including PTSD, RP 13-15, and the disabling tinnitus, RP 21, both of which the prosecutor acknowledged resulted from Dodd's combat service during the Vietnam War. RP 13.

The prosecutor conceded that Mr. Dodd's PTSD, depression and other "preexisting basically, mental health issues" would be relevant to establish a defense of diminished capacity. RP 14. But since defense counsel had abandoned that defense, "the fact that he is a veteran, the fact that he served in combat and that he had PTSD or other issues remains irrelevant." RP 15. Despite conceding that Dr. Trowbridge indicated that the root cause of the trouble was Mr. Dodd's preexisting mental illnesses or conditions," the prosecutor nevertheless argued that, because Dodd did not claim to have been experiencing a flash-back to combat, these war-related mental disabilities were irrelevant. RP 15.

The State also successfully moved to keep Dodd's war service from the jury. While acknowledging that, since the immediate trigger for the incident was the neighbors' ATV noise, the tinnitus might be relevant, the State argued that the jury did not need to know its cause, because any

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thin wafer of relevance would be outweighed by the prejudice to the State if the jury knew "that the Defendant is a combat veteran for Vietnam, that he suffered from PTSD or other diagnoses apparently as a result of his service in that country." RP 16. The court agreed that the tinnitus was relevant to explain why ATV noise was an issue but that the jury did not need to know the source. RP 20-21.

Defense counsel responded that Dodd was excruciatingly sensitive to all sudden or loud noises since his hearing was permanently damaged while jumping out of an airplane during combat, and that this contributed to his mental health problems and depression. RP 18, 19. Counsel argued that this evidence was relevant to whether Dodd intended assault anyone or to inflict great bodily harm. RP 17. "Though it didn't rise to the level of negating his ability to formulate intent, it is relevant to whether or not he intended to cause the harm the State's required to prove." RP 19.

"[I]t is relevant that he was in the service when he hurt himself, that that caused the ringing in the ears that resulted in the depression, and the depression and posttraumatic stress disorder resulted in the behavior alleged by the police to have been erratic and ongoing on the 7th of November." RP 19-20. Counsel argued that withholding this evidence would allow the jury to make false assumptions about the cause of Dodd's bizarre conduct, including that he was on drugs. RP 20.

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The court agreed with the defense on this point. The judge said that, although both experts said Dodd's PTSD and depression were not relevant to diminished capacity, "I think it does inform and provide some context of why Mr. Dodd may have done what he did." RP 22. The court ruled that the defense could "raise the issue that he's been diagnosed with PTSD and he suffers from depression. I think that provides context of why sometimes people do what they do." RP 22. "And as far as weighing the probative value, I think that goes to help explain why Mr. Dodd allegedly did what he did. And I think, you know, obviously it has some prejudicial impact, but I think the probative value outweighs that prejudicial impact to the State." RP 22. Again, though, the defense was precluded from mentioning Dodd's combat service. RP 22.

Finally, the court agreed with the State that it was appropriate to inform the jury that Mr. Dodd was trained in the use of firearms, but not for the defense to say that he was trained for military combat. RP 25.

The State requested an instruction on the lesser included offense of second degree assault. Defense counsel did not request an instruction on the lesser included offense of reckless endangerment. CP 25-30.

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The jury acquitted Dodd of first degree assault and convicted him of three counts of the lesser charge of second degree assault, with special verdicts that he used a.32 caliber pistol. CP 63, 64, and CP 69-71.

The standard range was 15-20 months on each count with a mandatory 36-month firearm enhancement, for a total range of 123-128 months. CP 81; RP 384. The court imposed 128 months. CP 81.

V. ARGUMENT

1. DODD'S CONSTITUTIONAL CHALLENGES MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

For the first time on appeal, Dodd claims he was denied due process because his trial was erroneously conducted under the insanity defense statute.

An issue may be raised for the first time on appeal if the Appellant can demonstrate prejudice arising from "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The Court employs a two-part analysis to determine whether to accept review of an error affecting a constitutional right. First, the alleged error must be truly constitutional. *State v. Kirkpatrick*, 160 Wn.2d 873, 879, 161 P.3d 990 (2007).

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First, it was error to order mental health evaluations under the insanity defense statute, Chapter 10.77 RCW. This statute authorizes court-ordered evaluations solely of defendants who either claim to be incompetent to stand trial or plead not guilty by reason of insanity. RCW 10.77.060(1)(a). Dodd did neither.

This error prejudiced Dodd in two ways:

(a) The insanity defense statute places the burden on the defendant to establish the defense by a preponderance of the evidence. RCW 10.77.030(2). A claim of diminished capacity, by contrast, maintains the burden on the State to prove every element, including the culpable state of mind, beyond a reasonable doubt. *State v. Farley*, 48 Wn.2d 11, 19, 290 P.2d 987 (1955), *cert. denied*, 352 U.S. 858, 77 S. Ct. 79, 1 L. Ed. 2d 65 (1956); *State v. Davis*, 6 Wn.2d 696, 714, 108 P.2d 641 (1940)

(b) The insanity defense statute requires a mental health expert to express an opinion regarding, not merely the existence of mental and emotional conditions, but also the defendant's ability to form intent at the time of the alleged act. RCW 10.77.060(3)(d). In the diminished capacity defense, by contrast, the only legitimate province of the mental health expert is to verify the existence of a mental or emotional condition sufficient to serve as the foundation. Whether, under the particular facts

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and circumstances, the defendant's capacity was diminished is solely for the jury to decide. The mental health expert who establishes the existence of foundational mental conditions simply lacks testimonial competence, not having been present at the crime scene and having no personal knowledge of the events Erroneously invoking the insanity defense statute caused both mental health evaluators here to exceed the limits of their expertise and trespass on the functions of the judge and jury. Please see Issue 6.

This prejudiced Dodd to such an extent that it amounted to a structural error. Please see Issue 8. Besides shifting the burden of proof, the incompetent expert opinions led defense counsel to abandon a perfectly plausible defense. Please see Issue 3. This in turn violated Dodd's right under the Sixth Amendment and Const. art. 1, §22 to present a complete defense and also constituted ineffective assistance of counsel. Please see Issues 4 and 7.

Dodd also claims for the first time here that a manifest injustice resulted from his counsel's failure to request a jury instruction on the lesser included offense of reckless endangerment, which was supported by the evidence both as a matter of law and of fact and would have reduced his sentence at least ten-fold. Please see Issue 10.

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An error is "manifest" in the context of RAP 2.5(a)(3) if it resulted in actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009), quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Actual prejudice is established by a "plausible showing" that the error had "practical and identifiable consequence in the trial of the case." *Id.* And the trial record must be sufficient to determine the merits of the claim. *O'Hara*, 167 Wn.2d at 99; *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The constitutional errors asserted by Dodd are all manifest and resulted in severe prejudice.

2. THE TRIAL COURT VIOLATED DUE PROCESS BY ORDERING MENTAL EVALUATIONS UNDER A STATUTE APPLICABLE SOLELY TO INCOMPETENCE OR INSANITY PROCEEDINGS.

The court, on its own motion, ordered Mr. Dodd to be evaluated at Western State Hospital as to his mental condition, for the purpose of determining his capacity to form criminal intent. CP 5. This order was purportedly under the authority of the insanity defense statute, RCW 10.77.030 and .060. CP 5, 8.[3] But that statute has no application here.

Not Guilty By Reason of Insanity: A defendant may move the trial court for a judgment of acquittal on the grounds of insanity. RCW

[3] Please see Appendix for text of statutes.

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10.77.080. By its plain language, RCW 10.77.030 is the statute governing establishing insanity as a defense. A ruling that a person is "criminally insane" means he may be acquitted of the charged crime but is thereupon found to be a substantial danger to others, or to present a substantial likelihood of committing criminal acts jeopardizing public safety or security unless kept under further control by the court or other persons or institutions. RCW 10.77.010(15). An "incompetent" person is one who lacks the capacity to understand the nature of the proceedings against him or to assist in his own defense, as a result of mental disease or defect. RCW 10.77.010(4). Evidence of insanity is not admissible unless the defendant first files a written notice of his or her intent to rely on such a defense. RCW 10.77.030(1). This record contains no such written notice.

Washington follows the *M'Naghten* rule for determining insanity, which has been codified as RCW 9A.12.010. *State v. Klein*, 156 Wn.2d 105, 113, 124 P.3d 644 (2005). The defendant must establish by a preponderance of the evidence that, at the time of the offense, (a) his mind was affected as a result of mental disease or defect to such an extent that he was unable to perceive the nature and quality of the act with which he is charged; or (b) he was unable to tell right from wrong with reference to the particular act charged. Former RCW 9A.12.010; *see also* RCW 10.77.030(2). Because a verdict of not guilty by reason of insanity

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completely absolves a defendant of any criminal responsibility, the insanity defense "is available only to those persons who have lost contact with reality so completely that they are beyond any of the influences of the criminal law." *State v. Crenshaw*, 98 Wn.2d 789, 793, 659 P.2d 488 (1983), quoting *State v. White*, 60 Wn.2d 551, 590, 374 P.2d 942 (1962); *State v. Chanthabouly*, ___ Wn.2d ___. ___ P.3d ___ (2011), WL 4447863, Slip Op. No. 39510-0-II at 12 -13. That simply was not the case here.

Moreover, a defendant asserting the insanity defense bears the initial burden of producing evidence of insanity. RCW 10.77.030(2); *State v. Box*, 109 Wn.2d 320, 322, 745 P.2d 23 (1987). Additionally, the defendant has the ultimate burden of persuading the trial court by a preponderance of the evidence that he was insane at the time of the charged offense. RCW 10.77.030(2); RCW 10.77.080.

The insanity defense statute calls upon the evaluator, when directed by the court, to render an opinion as to the capacity of a defendant claiming insanity to manifest a particular state of mind that is an element of the charged offense. RCW 10.77.060(3)(e). This means that, to establish the insanity defense by a preponderance, the defendant must produce an expert to render an opinion as to the defendant's sanity at the time of the act. This is in addition to the diagnosis of the underlying

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mental condition and an opinion as to the defendant's competency to face trial. RCW 10.77.060(3)(b), (c). But these statutory provisions apply solely to a defendant who seeks acquittal under chapter 10.77 by reason of insanity. In such cases, the burden is on the defendant to prove insanity by a preponderance of the evidence, and the decision is made by the judge, not a jury. RCW 10.77.080; *Chanthabouly*, at 13.

In addition, the court's error gave Dr. Ronnei access to discovery materials including Sheriff's Office reports detailing the criminal allegations as well a report of Dodd's criminal history and Cowlitz County Jail records. CP 8-9. None of this was authorized by RCW 10.77, even had that statute applied. The statute authorizes the expert to receive solely those records "that relate to the present or past mental, emotional, or physical condition of the defendant." RCW 10.77.060(1)(a).

Here, Mr. Dodd did not dispute his competency to stand trial, and he did not seek acquittal on grounds of insanity. Accordingly, expert opinion as to his sanity at the time of the act was inappropriate.

Diminished Capacity. Diminished capacity is not the same as insanity. *State v. Carter*, 5 Wn. App. 802, 804, 490 P.2d 1346 (1971). Diminished capacity is not the same as insanity. The question presented by a claim of insanity is whether the accused has the mental capacity under any circumstances to manifest a criminal state of mind. *Id.*

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Diminished capacity, by contrast, asks merely whether, on a particular occasion and under the circumstances then prevailing, the defendant's underlying mental or emotional condition substantially reduced the probability that he did in fact form the requisite state of mind that constitutes an essential element of the crime. *White*, 60 Wn.2d at 558.

To maintain a diminished capacity defense, as distinguished from an insanity defense the defendant need only present evidence of the existence of a mental or emotional condition. It is then for the jury to determine whether, under the particular circumstances prevailing at the time, it is beyond reasonable doubt that the defendant's capacity to form the requisite intent was undiminished. *Carter*, 5 Wn. App. at 805. Discussed below at Issue 3. The burden remains with the State to prove every element, including a culpable state of mind, beyond a reasonable doubt. *State v. Farley*, 48 Wn.2d at 19); *Davis*, 6 Wn.2d at 714.

The Ronnei Report: Dr. Ronnei's report of her evaluation of Dodd for insanity illustrates the inherent due process violation.

As a preliminary matter, Dr. Ronnei informed Dodd he could have a lawyer present and that "he could decline to answer questions he found objectionable." CP 8. This reflects the adversarial nature of the relationship between Dr. Ronnei and Mr. Dodd, arising from the fact that a court-ordered insanity defense evaluator may be compelled to testify.

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But the extraneous insanity evaluation resulted in much more serious prejudice to Mr. Dodd. After rendering an opinion within her area of expertise and believing herself to be operating under the authority of the insanity statute, Dr. Ronnei assumed the role of the judge, then that of the jury.

Dr. Ronnei set forth her working legal definition of diminished capacity. Perhaps having reviewed the insanity statute under which she was asked to render an opinion, she states that a person could be found diminished in their capacity if, as the result of a mental disorder not amounting to insanity, they are incapable of forming the mental state that is an element of the crime charged." CP 16. Dr. Ronnei thought it was her job to determine whether, under the particular circumstances alleged, Dodd "lacked the capacity to form the requisite intent for Assault in the First Degree." CP 20. All that remained for the jury, according to Dr. Ronnei, was to decide "whether or not he did in fact form the requisite mens rea." CP 20. First, this is a legal opinion. Second, it is wrong.

No fact witness, even an expert, may express an opinion as to the law. This usurps the role of the judge. *State v. Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). And Dr. Ronnei is misinformed as to what constitutes diminished capacity as distinct from insanity. An accused may not lack the capacity to premeditate, for instance, but he may still

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introduce evidence that he is suffering from a mental disease or defect that substantially reduces the probability that he actually did premeditate with regard to the crime with which he is charged. *White*, 60 Wn.2d at 558.

Dr. Ronnei then states the rule of law she deemed applicable to a charge of assault. She notes that Mr. Dodd was charged with assault in the first degree, for which the mens rea is *intentionally*. Dr. Ronnei then opines that the applicable definition of 'intent' is that found in RCW 9A.08.010(1)(a): A person acts with intent or intentionality when he acts with the objective or purpose to accomplish a result which constitutes a crime. CP 16.

After performing the function of judge, Dr. Ronnei puts on her juror's cap renders a factual determination of what happened on the night in question based on "evidence" in the form of out-of-court statements by the Sheriff's Office, Ms. Nicholas, a VA social worker, and Mr. Dodd himself. CP 17-20.

But it is well established that a mental health expert who performs a pretrial evaluation lacks testimonial competence regarding either the events or the defendant's state of mind at the time of the alleged offense. *State v. Upton*, 16 Wn. App. 195, 201, 556 P.2d 239 (1976) (doctor's opinion regarding defendant's mental state at the time of the shooting inadmissible absent testimonial knowledge), *review denied*, 88 Wn.2d

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1007 (1977); *State v. Fullen*, 7 Wn. App. 369, 382-83, 499 P.2d 893, *review denied*, 81 Wn.2d 1006 (1972), *cert. denied*, 411 U.S. 985, 93 S. Ct. 2282, 36 L. Ed. 2d 962 (1973); *State v. Craig*, 82 Wn.2d 777, 779-80, 514 P.2d 151 (1973) (opinion testimony of doctor who was not a witness to the crime and lacked first hand knowledge of defendant's state of mind at time of charged offense was properly excluded); *State v. Moore*, 61 Wn.2d 165, 172-73, 377 P.2d 456 (1963) (psychiatrist's opinion that defendant was incapable of forming intent not sufficient to require a manslaughter instruction); *State v. Cogswell*, 54 Wn.2d 240, 248, 339 P.2d 465 (1959) (testimonial knowledge of demeanor of defendant at proximate time of offense is required for admission of testimony as to defendant's capacity to form specific intent).[4] Authority under the insanity defense statute for an expert to make recommendations diminished capacity, arises solely for the purpose of determining bail. RCW 10.77.030(1)(b).

The correct procedure would have been for the court simply to approve public funds pursuant to CrR 3.1(f) for the defense to consult an expert who would have been answerable solely to defense counsel who would have directed the focus of the examination. Counsel could then have limited the evaluation to the consultant's area of expertise: namely, whether Dodd, at the time of the confrontation with police, suffered from a

[4] Cited at *State v. Ellis*,136 Wn.2d 498, 530, 963 P.2d 843 (1998), Talmadge, J. dissenting.

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qualifying condition that would entitle him to instruct the jury on the defense of diminished capacity. That is, whether his mental condition was such as to have reduced his ability to make a considered decision to deliberately shoot at another human being.

3. THE RECORD CONTAINS SUFFICIENT FOUNDATION EVIDENCE TO PRESENT THE ISSUE OF DIMINISHED CAPACITY TO THE JURY WITH AN APPROPRIATE INSTRUCTION.

The Washington Pattern Jury Instructions include the following instruction: "Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form (fill in requisite mental state)." *Washington Practice: Washington Pattern Jury Instructions: Criminal* 18.20, at 286 (3d ed. 2008) (WPIC).

When a defendant presents substantial evidence of a mental illness or disorder and the evidence logically and reasonably connects the defendant's alleged mental condition with the inability to form the mental state necessary to commit the charged crime, a trial court must give the diminished capacity instruction. *State v. Marchi*, 158 Wn. App. 823, 833, 243 P.3d 556 (2010), *review denied*, 171 Wn.2d 1020, 253 P.3d 393 (2011), citing *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001); *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). For

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example, in a forgery prosecution in *State v. Griffin*, 100 Wn.2d 417, 670 P.2d 265 (1983), instructing the jury solely on the elements of forgery and giving them an instruction on intent did not suffice where the defendant claimed that diminished capacity prevented him from forming the requisite intent. *Griffin*, 100 Wn.2d at 418.

Mr. Dodd's jurors should have received this instruction, and the fact that they did not is a reversible error.

The diminished capacity defense functions as a rule of evidence that allows a defendant to introduce otherwise inadmissible evidence relevant to his subjective state of mind. *State v. Stumpf*, 64 Wn. App. 522, 525 n. 2, 827 P.2d 294 (1992), citing John Q. La Fond & Kimberly A. Gaddis, WASHINGTON'S DIMINISHED CAPACITY DEFENSE UNDER ATTACK, 13 U. Puget Sound L. Rev. 1, 22 (1989). The instruction allows the jury to take evidence relevant to diminished capacity into account when determining whether the defendant could form the requisite mental state. *Stumpf*, 64 Wn. App. at 524–25.

Any competent evidence that "tends logically, naturally and by reasonable inference to prove or disprove a material issue is relevant and should be admitted unless it is specifically inadmissible by reason of some affirmative rule of law." *Carter*, 5 Wn. App. at 805. The diminished capacity defense asserts that the defendant was unable to form what used

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to be called the "specific intent" required to commit the charged crime. It is an essential element of the crime, and evidence regarding it is, therefore, always material. *State v. Nuss*, 52 Wn. App. 735, 738, 763 P.2d 1249 (1988).

Here, the judge, prosecutor and defense counsel all lost sight of the distinction and erroneously invoked provisions applicable solely to an insanity defense that Mr. Dodd did not plead.

The decision reversing the conviction in *Carter* is illustrative. The defendant was charged with burglary and claimed he had not intended to commit a crime when he unlawfully entered the building. It was error to preclude Carter from introducing evidence of his mental condition. Like Dodd, Carter offered the testimony of a psychiatrist who had examined him and reviewed his history of psychiatric treatment. *Carter*, 5 Wn. App. at 805. As in Dodd's case, the offered evidence would not support a finding of insanity as defined by RCW 10.76.010. But, also as in Dodd's case, the evidence was still relevant for the legitimate defense purpose of establishing that Carter lacked the mental capacity to form the intent to commit the crime. *Carter*, 5 Wn. App. at 805.

In *Carter*, the trial court erroneously relied on *Cogswell* in rejecting the evidence of Carter's existing mental state to establish his state of mind at the time of the alleged crime. *Carter*, 5 Wn. App. at 803-

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804. This was error, because, while not proving insanity, the evidence went to Carter's capacity to form an intent at the relevant time:

> It is not disputed that Mr. Carter had the capacity to know the difference between right and wrong, and to understand that difference, nor is it disputed that he was competent to assist in his own defense. The question is whether his capacity to form an intent to commit the crime was diminished. **Whether the offered testimony rebutted the presumption of intent pursuant to [the burglary statute] is a question for the jury** when and if the proper foundation for the introduction of the testimony is laid. The offer of proof was sufficient to carry the question of whether Mr. Carter had 'psychiatric problems' to the jury but this was not in issue. The offered evidence must provide a basis for a lay jury to at least infer that the alleged condition, if it existed, could reasonably affect the capacity of Mr. Carter to form an intent to commit the crime charged. The law inquires not into the peculiar constitution of mind of the accused, or the mental weaknesses or disorders or defects with which he may be afflicted, but solely into the question of his capacity, **at the time he committed a forbidden act**, to have a criminal intent.

Carter, 5 Wn. App. at 806-07 (emphasis added.)

This is consistent with the principle that the presence of a mental disease or defect that falls short of insanity is admissible if it is relevant to establishing the essential elements of certain crimes: for example, intent. *White*, 60 Wn.2d at 558.

> An accused may not lack the capacity to premeditate, for instance, but he may still introduce evidence that he is suffering from a mental disease or defect, which disease or defect substantially reduces the probability that he actually

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did premeditate with regard to the crime with which he is charged.

White, 60 Wn.2d at 558.

In *Carter*, moreover, the charged offense was burglary, in which the defense had the burden to overcome a statutory presumption that unlawfully entering a building implied the intent to commit a crime, absent evidence to the contrary. *Carter*, 5 Wn. App. at 805. No such presumption attaches to a charge of assault. The burden was squarely on the State to prove beyond a reasonable doubt that Dodd intended to inflict the harm potentially resulting from the charged crimes.

By way of limitation, to constitute a true defense, the cause of the inability to form the requisite intent cannot be voluntary intoxication or an emotion such as fear or anger; it has to be a mental disorder. RCW 9A.16.090;[5] *State v. James*, 47 Wn. App. 605, 608, 736 P.2d 700 (1987). *State v. Moore*, 61 Wn.2d 165, 377 P.2d 456 (1963). And the mental disorder must be causally connected to a lack of intent, not merely to reduced perception, overreaction or other irrelevant mental states. *State v. Edmon*, 28 Wn. App. 98, 103, 621 P.2d 1310 (1981). With the proper

[5] No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state. RCW 9A.16.090.

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foundation, however, diminished capacity may raise a reasonable doubt as to the mental state element of the offense, thus leading to acquittal or conviction of a lesser included offense. *Marchi*, 158 Wn. App. at 833.

Diminished capacity is not an affirmative defense or a complete defense. *See, e.g.*, 13 U. Puget Sound L. Rev at 22. Rather, it is evidence the jury may consider when it determines whether the accused "was able to form the requisite mental state to commit the crime." *Marchi*, 158 Wn. App. a 836, citing *Stumpf*, 64 Wn. App. at 524; *James*, 47 Wn. App. at 608.

Here, the question that should have been presented to the jury was whether Dodd was able to act "with the objective or purpose to accomplish a result which constitutes a crime." Instr. 8, CP 41 (definition of intent).

It was error to keep the unrefuted evidence of Dodd's prevailing mental and emotional condition and his severe tinnitus from the jury. The jury may have found that the State failed to prove that these aggravating factors, coupled with Mr. Dodd's underlying mental infirmities, did not diminish his ability to form criminal intent.

Reversal is required.

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4. THE FAILURE TO DISTINGUISH BETWEEN A PLEA OF NOT GUILTY BY REASON OF INSANITY AND A CLAIM OF DIMINISHED CAPACITY PREVENTED DODD FROM ASSERTING A COMPLETE DEFENSE.

The right of an accused person to present relevant testimony in his defense is guaranteed by the United States and the Washington Constitutions. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983).[6] The threshold for admitting relevant evidence is very low, and even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

Here, because the prosecutor, defense counsel, and even the judge, misconstrued the nature of the diminished capacity defense by conflating it with insanity Mr. Dodd was unable to present a coherent and complete defense to the jury.

As a result of the erroneous introduction of the insanity statute and the associated gratuitous experts' opinions regarding the facts left defense counsel little option but to abandon Mr. Dodd's most persuasive defense. Counsel believed he could no longer contend that the evidence was sufficient to create reasonable doubt that, under the circumstances at the

[6] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor." Similarly, Const. art. 1, § 22 guarantees that "[i]n criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf."

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time of the police action, Dodd's ability to form criminal intent was diminished, despite uncontroverted opinion from two experts that Dodd suffered from PTSD, debilitating depression, and excruciating tinnitus as a result of his military combat service.

The remedy is to reverse.

5. GRANTING THE STATE'S MOTION TO SUPPRESS RELEVANT EVIDENCE ALSO INFRINGED ON DODD'S ABILITY TO PRESENT A COMPLETE DEFENSE.

The court granted the State's motion to withhold from the jury that Mr. Dodd's PTSD, depression and tinnitus was his service in Vietnam, on the dubious ground that this knowledge would unduly prejudice the State. This was error, based upon the same legal principals discussed in Issue 3.

A defendant's right to present relevant evidence may be limited to protect the State's interest only if the evidence is "so prejudicial as to disrupt the fairness of the trial." *Darden*, 145 Wn.2d at 621. But even then, the State's interest in excluding evidence must be balanced against the benefit to the defense of introducing the information to the jury. Only if the State's interest outweighs that of the defendant can relevant evidence be withheld. *Darden*, 145 Wn.2d at 622.

For evidence of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth

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Amendment and Const. art. 1, § 22." The trial court erred in suppressing background evidence of the history of Dodd's emotional and physical difficulties. This evidence was relevant to provide context for the incident and to reduce the likelihood that the jury would blame Mr. Dodd for his situation.

A defendant's right to present relevant evidence is limited by "the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial." *Darden*, 145 Wn.2d at 621. But telling the jury a defendant is a war veteran is unlikely to disrupt the trial. Moreover, the court must balance the State's interest in excluding evidence "against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld." *Darden*, 145 Wn.2d at 622. For evidence of sufficient probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *Hudlow*, 99 Wn.2d at 16. The basis for Mr. Dodd's physical, mental, and emotional impairment was probative.

Dodd was entitled to present this evidence even were it no more than minimally relevant. *Darden*, 145 Wn.2d at 621-22. But it was highly relevant because it would serve to allay any suspicion that Dodd might be to blame for his severe, chronic, and debilitating injuries.

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Further, evidence that Dodd's condition was a legacy from his combat service was essential defense evidence, because it tended to establish a plausible inference about the likely existence and severity of his PTSD and tinnitus, the foundational mental conditions sufficient to permit a properly-instructed jury to consider the extent to which Dodd should be deemed culpable. This made it relevant under ER 401.[7] This was relevant to the existence of Without the causation evidence, the jury could have assumed that Dodd's hearing loss and mental and emotional difficulties were self-inflicted as the result of poor diet, reckless or profligate life choices, or too many rock concerts. Indeed, this is more likely than not, because a reasonable juror would expect the defense to present such evidence if it existed.

Keeping the jury in the dark about Mr. Dodd's honorable military service denied Dodd the benefit of the common knowledge that many of our combat veterans are permanently damaged precisely as was Mr. Dodd. This was relevant to establish foundational mental conditions sufficient to entitle him to have the jury consider the extent to which he should be deemed culpable. Concealing this mitigating evidence, moreover, allowed the jury to suppose that Dodd's difficulties might be the just desserts of

[7] "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable hat it would be without the evidence.

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poor judgment, a profligate lifestyle in which he failed to take care of himself and heedlessly placed himself in unsafe situations, or knowingly risking permanent ear damage by choosing to attend deafening rock concerts. Perhaps with this in mind, the prosecutor did not seek to exclude evidence that Dodd had consumed alcohol on the afternoon evening of November 7th, 2010. RP 21.

But for this error, a reasonable jury could have found that Mr. Dodd experienced a lapse of capacity as a foreseeable consequence of the combined effect of his mental and emotional infirmities and the punishing clamor of his neighbor's ATVs. The prevailing circumstances raise serious questions about Dodd's ability to form the requisite intent to support a conviction for assault. The remedy is to remand for a new trial.

6. THE COMBINED ERROR OF THE COURT, PROSECUTOR AND DEFENSE COUNSEL INVADED THE EXCLUSIVE PROVINCE OF THE JURY.

The Sixth Amendment and art. 1, § 22 guarantee the right of those facing criminal prosecution to have the essential elements of the charge determined by a jury. A reviewing court cannot assess the impact that denying any item of evidence may have had on the minds of individual jurors. *State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946). Accordingly, the court does not invade the province of the jury by

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weighing the evidence. Dennis J. Sweeney, AN ANALYSIS OF HARMLESS ERROR IN WASHINGTON: A PRINCIPLED PROCESS, 31 Gonz. L. Rev. 277, 279 (1995). Likewise, courts should not interpret statutory language in such a way as to take a jury question away from the jury. *State v. Hacheney*, 160 Wn.2d 503, 528, 158 P.3d 1152 (2007), Johnson, J, (concurring and dissenting in part.)

Here, the combined errors by the judge, prosecutor and defense counsel denied Mr. Dodd his constitutional right to have his jury decide whether or not, as the events unfolded, he was sufficiently incapacitated by the circumstances allegedly prevailing, to raise a reasonable doubt as to whether he acted with a culpable mental state. The Court should reverse and remand for a new trial.

7. WITHHOLDING THE DIMINISHED CAPACITY DEFENSE FROM THE JURY CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. X). To prevail on an ineffective assistance claim, a defendant must show that defense counsel's representation was deficient and the deficient representation prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

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A debatable strategic decision will not generally support an ineffective assistance claim. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). There is a strong presumption that counsel was effective. *McFarland*, 127 Wn.2d at 334–35. Generally, a decision that reflects trial strategy or tactics does not show deficient performance. *State v. Alvarado*, 89 Wn. App. 543, 553, 949 P.2d 831 (1998). But deficient performance is established where the record shows that no legitimate strategic or tactical reason can be devised that justifies the challenged conduct. *Grier*, 171 Wn.2d at 42; *State v. Rainey*, 107 Wn. App. 129, 135–36, 28 P.3d 10 (2001). A disastrous tactical decision by defense counsel not to offer important evidence can provide the basis for an ineffective assistance claim, if the appellant demonstrates an absence of any legitimate strategic reason to support the challenged conduct. *Alvarado*, 89 Wn. App. at 548

Prejudice is established by demonstrating a reasonable probability that the outcome of the trial would have been different but for counsel's error. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). At tactical blunder is prejudicial if this Court is satisfied that, but for counsel's blunder, there is a reasonable probability the outcome of the trial would have been different. *McFarland*, 127 Wn.2d at 335. This Court will reverse and remand where the record discloses no legitimate reason

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for counsel's conduct. *State v. Saunders*, 91 Wn. App. 575, 578, 581, 958 P.2d 364 (1998).

Here, the decision to abandon the diminished capacity defense was a tactical blunder, based on a misunderstanding of the law, and for which no plausible strategic justification can be conceived.

Defense counsel was clearly conflicted about conceding the State's claim that Dodd's mental and physical impairments could not have affected his ability to form intent. Counsel repeatedly appeared to concede but persisted in arguing that Dodd's mental, emotional, and physical impairments prevented him from forming the intent "to cause the harm the State's required to prove." RP 19. When the prosecutor moved, in light of counsel's having withdrawn the diminished capacity defense, to exclude any reference to Dodd's mental condition or intoxication, defense counsel responded:

> My position is there's a difference between arguing that he was unable to formulate intent based on mental issues — that's diminished capacity, and both experts indicated that's not present — between issues affecting a person at the time the crime is alleged to have been committed that impact whether or not they intended to commit the crime.

RP 312. Counsel went on to argue that the State's witnesses were called out to a suicidal subject, that Ms. Nicholas corroborated that Dodd was suicidal; that his depression aggravated by the noise caused a suicidal

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state; and that Dodd's actions were consistent with an individual trying to commit suicide by the police. Counsel argued that this evidence all went "to his state of mind at the time that's relevant as to whether or not he intended to cause harm to the police or whether he was only intending to bring harm upon himself." RP 312-13. Counsel recognized that the experts had foreclosed any claim that Dodd was not capable of formulating intent, but he nevertheless insisted that the State had failed in its burden to prove that Dodd intended to cause harm. RP 313.

Counsel here clearly is arguing for a diminished capacity defense. The error lies in conflating insanity with diminished capacity. "Inability to formulate intent based on mental issues" is not diminished capacity. It is insanity. "Issues affecting a person at the time the crime is alleged to have been committed that impact whether or not they intended to commit the crime" — that is diminished capacity. And diminished capacity is not a matter for expert opinion. It is a jury question. But counsel thought diminished capacity did not require testimony from a mental health expert; that only total lack of capacity, i.e., insanity did. RP 313. Counsel was totally aware that Dr. Trowbridge "believed the mental health issues were the cause; that's what his report was." RP 314.

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This demonstrates unequivocally that abandoning the diminished capacity defense was not a legitimate strategy, but a blunder resulting from a misunderstanding of the law.

Moreover, the prosecutor and the judge repeatedly stated that there was sufficient evidence of chronic and debilitating impairments to establish the foundational prerequisite for submitting the issue of diminished capacity to the jury. The judge expressly stated that the defense was free to argue that intent was diminished by alcohol and depression. RP 315-16.

Dodd's only cogent and comprehensible defense was that his capacity to form the intent to assault anyone or harm anyone was diminished by his chronic impairments, exacerbated by the intolerable conditions giving rise to his mental breakdown. No legitimate tactical purpose could possibly have been served by failing to dispute the State's claim that unsworn and uncross-examined pretrial testimony by expert witnesses could decide the ultimate fact question of whether Mr. Dodd's proven disorders could have diminished his ability to form the requisite intent at the relevant time.

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8. FAILING TO DISTINGUISH BETWEEN INSANITY AND DIMINISHED CAPACITY INFECTED THE ENTIRE TRIAL AND CONSTITUTED STRUCTURAL ERROR.

A structural error is one that affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *In re Det. of Kistenmacher*, 163 Wn.2d 166, 185, 178 P.3d 949 (2008), quoting *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). The Fourteenth Amendment requires that criminal prosecutions comport with prevailing notions of fundamental fairness, and that defendants have a meaningful opportunity to present a complete defense. *State v. Perez-Cervantes*, 141 Wn.2d 468, 489-90, 6 P.3d 1160 (2000), citing *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (reversible error to withhold from jury circumstances of repudiated confession.) An error is "structural" if it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. *Rivera v. Illinois*, 556, U.S. 148, ___, 129 S. Ct. 1446, 1455, 173 L. Ed. 2d 320 (2009). That is what happened here.

Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." *U.S. v. Cronic*, 466 U.S.

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648, 656, 104 S. Ct. 2039, 2045 (1984). The blanket exclusion of exculpatory evidence deprives a defendant of the basic right to subject the prosecutor's case to "the crucible of meaningful adversarial testing." *Crane*, 476 U.S. at 690-91 (reversible error to withhold from the jury the circumstances of a repudiated confession.) That is what happened here.

The error goes beyond mere ineffective assistance of defense counsel. The State and the court set the course of the trial at the outset when the court erroneously granted the State's motion to order a mental health evaluation under the insanity statute. Moreover, it is plain from the record that the court recognized that the evidence established serious mental, emotional and physical problems at the time of the confrontation with police. It was error for the court not to recognize that sufficient foundation had been laid to permit the jury to decide the issue of diminished capacity and to receive an instruction on the elements of diminished capacity.

A structural error is never harmless. *State v. Frost*, 160 Wn.2d 765, 779, 161 P.3d 361 (2007), citing *Fulminante*, 499 U.S. at 310. It requires automatic reversal. *Neder*, 527 U.S. at 8.

The Court should reverse and remand.

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9. THE CIRCUMSTANCES IN WHICH THE DIMINISHED CAPACITY DEFENSE WAS ABANDONED CONSTITUTED A CONSTRUCTIVE CRAWFORD VIOLATION.

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Sixth Amendment Confrontation Clause, U.S. CONST. amend. VI. Article I, section 22 of the Washington Constitution provides that "[i]n criminal prosecutions, the accused shall have the right ... to meet the witnesses against him face to face." *State v. Pugh*, 167 Wn.2d 825, 834-835, 225 P.3d 892 (2009). These Confrontation Clauses exclude testimonial hearsay from criminal trials unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). "Testimonial" simply means that a declarant would reasonably expect his or her statements to be available for use at trial. *Crawford*, 541 U.S. at 52; *Saunders*, 132 Wn. App. 592, 601-02, 132 P.3d 743 (2006).

Here, Mr. Dodd was deprived of a perfectly viable defense by what amounted to testimony by his counsel and the prosecutor that two mental health professionals, who did not testify, had each submitted a written opinion rejecting diminished capacity as a defense to Dodd's alleged criminal conduct. The experts' statements clearly were testimonial.

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The fact that the statements exerted their devastating effect upon Mr. Dodd's ability to defend himself during pretrial proceedings, rather that before the jury, does not alter the fundamental principle. Neither are the consequences of the confrontation error mitigated by the fact that defense counsel and the prosecutor, not the court, erroneously deprived Dodd of a defense that might have brought an acquittal. Mr. Dodd suffered a reversible Sixth Amendment error, whether characterized as a constructive Confrontation Clause violation, or an actual Right to Counsel violation.

Given the dispositive effect of their "testimony", these experts should have been grilled under oath regarding their credentials and competency, and the medical and scientific support for their opinions that Dodd's undisputed mental, emotional and physical impairments had no effect on his ability to form a particular state of mind under specific circumstances at a given place and time. The issue should have been submitted to a properly instructed jury, not decided by unseen "experts."

Constitutional error is always prejudicial unless the State proves that the error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Specifically, a conviction based erroneously admitted testimonial hearsay requires reversal unless the error was harmless beyond a reasonable doubt. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844

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(2005). A constitutional error is not harmless unless this Court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *Id.*

This error requires reversal.

10. THE JURY SHOULD HAVE BEEN INSTRUCTED ON RECKLESS ENDANGERMENT AS A LESSER INCLUDED OFFENSE.

A criminal defendant is entitled to instructions sufficient to allow him to argue his theory of the case. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). A two-pronged test determines the need for a lesser-included-offense instruction. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). First, each element of the lesser offense must be a necessary element of the offense charged (the legal prong) and second, the evidence in the case must support an inference that the lesser included crime was committed (the factual prong). *Workman*, 90 Wn.2d at 447-48.

Washington statutes assure the "unqualified right" to have the jury instructed on a lesser included offense if there is "even the slightest evidence" that he may have committed only that offense. RCW 10.61.006; RCW 10.61.010; *State v. Bowerman*, 115 Wn.2d 794, 805, 802 P.2d 116 (1990); *State v. Parker*, 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984), quoting *State v. Young*, 22 Wash. 273, 276-77, 60 P. 650 (1900).

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The facts of Mr. Dodd's case satisfy the "slightest evidence" test.

In deciding whether sufficient evidence supported a lesser included offense instruction, this Court views the evidence in the light most favorable to the defendant — not the State. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The trial court should give a requested jury instruction on a lesser included or inferior degree offense where the evidence would permit a jury to rationally find a defendant guilty only of the lesser offense but not guilty of the greater. *Fernandez-Medina*, 141 Wn.2d at 456. "If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given." *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997).

Both the legal and factual prongs of *Workman* establish reckless endangerment as a lesser included offense of second degree assault.

Reckless Endangerment: RCW 9A.36.050 defines reckless endangerment as recklessly engaging in conduct that creates a substantial risk of death or serious physical injury to another person. RCW 9A.36.050(1). Reckless endangerment is a gross misdemeanor. RCW 9A.36.050(2).

Had Dodd's jury received this instruction, it is highly probable that they would have opted to convict Dodd on this charge. As it was, this jury

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convicted Dodd of second degree assault, that is, merely that he assaulted someone with a deadly weapon. Instr. 21-23, CP 54-56. Assault was defined as intentional shooting, or doing an act with the intent to inflict bodily injury, or acting with the intent to create apprehension and fear of bodily injury. But the jury acquitted of first degree assault, which is assaulting someone with intent to inflict great bodily harm. Instr. 7, CP 40. So they simply found that he intentionally fired shots that was offensive. Instr. 11, CP 44.

Washington recognizes a hierarchy of mental states. In descending order of culpability, they are intent, knowledge, recklessness and criminal negligence. RCW 9A.08.010(1); *State v. Soto*, 45 Wn. App. 839, 841, 727 P.2d 999 (1986). In the context of included offenses, a mental state can substitute for another if it is of lower culpability. *State v. Tucker*, 46 Wn. App. 642, 645, 731 P.2d 154 (1987). Here, recklessness may substitute for intent because it is of lower culpability.

Had the defense presented the foundational expert mental impairment evidence on the intent element — or even without it — it is likely the jury would have convicted Mr. Dodd on the lesser charge of reckless endangerment, because the same evidence that established second degree assault arguably comprised "conduct that created a substantial risk of death or serious physical injury" to others.

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Ineffective Assistance: Overlooking the reckless endangerment alternative constituted ineffective assistance of counsel. Ineffective assistance for failing to request a jury instruction is established by identifying the instruction that should have been given, showing that it likely would have been given if requested, and explaining the prejudice resulting from the lack of the instruction. *Cienfuegos*, 144 Wn.2d at 227.

Deficient Performance: The decision not to request a lesser included instruction may be a legitimate trial strategy to gamble on an all or nothing verdict. *See, e.g., State v. King*, 24 Wn. App. 495, 501, 601 P.2d 982 (1979). That is not a legitimate strategy, however, where counsel presents a defense that leaves the jury with no choice but to convict of the greater offense. *State v. Smith*, 154 Wn. App. 272, 278, 223 P.3d 1262 (2009). Here, the only lesser included offense instruction defense counsel proposed was for unlawful display of a weapon. CP 25-30. But numerous witnesses heard shots and saw muzzle flashes, so the jury could not possibly have convicted solely of unlawful display.

This was insupportable, because the evidence did support a finding of reckless endangerment. Moreover, the Court can conclude from the jury's rejection of the first degree assault charge that it seriously questioned the culpability of Dodd's state of mind. They well might have found, if given the opportunity, that the best fit for Dodd's conduct was an

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act that recklessly created a substantial risk of death or serious physical injury to another person. RCW 9A.36.050(1).

Prejudice: Combined with a diminished capacity instruction, giving the jury the option of reckless endangerment would have spared Dodd nine years of firearm enhancements, because reckless endangerment is a gross misdemeanor. RCW 9A.36.050(2). The firearm enhancement statute is included in the Sentencing Reform Act (SRA), Chapter 9.94A RCW, which applies solely to felonies, not to gross misdemeanors. RCW 9.94A.010; *State v. Snedden*, 149 Wn.2d 914, 922, 73 P.3d 995 (2003).

Thus, this error increased Dodd's sentence from a maximum of three years in the county jail — if the court imposed the exceptional sentence of consecutive misdemeanor maximums — to more than ten years in a State prison. RCW 9A.20.021(2).[8]

Moreover, trial courts have much broader discretion in sentencing gross misdemeanors than felonies. The SRA places substantial constraints on judges' historical discretion in felony sentencing, but no similar legislation restricts the court's discretion in sentencing for gross misdemeanors. *State v. Anderson*, 151 Wn. App. 396, 402, 212 P.3d 591

[8] RCW 9A.20.021(2): Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

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(2009), quoting *State v. Herzog,* 112 Wn.2d 419, 423-24, 771 P.2d 739 (1989). The trial court here might well have been moved to run one or more of the sentences concurrently.

Reversal is the proper remedy if counsel's errors deprived the defendant of the "counsel" guaranteed the defendant by the Sixth Amendment, provided the defendant can show prejudice. *Cienfuegos*, 144 Wn.2d at 226-227. Here, as in *Cienfuegos*, counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

VI. **CONCLUSION.** For the reasons stated, Charlie Dodd asks the Court to reverse his convictions and grant him a new trial.

Respectfully submitted, this 18th day of November, 2011.

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TEXT OF STATUTES AND RULES

RCW 10.77.030(1). Evidence of insanity is not admissible unless the defendant, at the time of arraignment or within ten days thereafter or at such later time as the court may for good cause permit, files a written notice of his or her intent to rely on such a defense. The record contains no written notice of intent to plead insanity.

RCW 10.77.030(2). Insanity is a defense which the defendant must establish by a preponderance of the evidence.

RCW 10.77.060(1)(a). Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

The defendant shall have access to all information obtained by the court appointed experts or professional persons. The defendant's expert or professional person shall have the right to file his or her own report.

For purposes of the examination, the court may order the defendant committed to a hospital or other suitably secure public or private mental health facility for a period of time necessary to complete the examination, but not to exceed fifteen days ... .

The signed order of the court shall serve as authority for the experts to be given access to all records held by any mental health, medical, educational, or correctional facility that relate to the present or past mental, emotional, or physical condition of the defendant.

RCW 10.77.020(4). In a competency evaluation conducted under chapter 10.77, the defendant may refuse to answer any question if he or she believes his or her answers may tend to incriminate him or her or form links leading to evidence of an incriminating nature.

APPENDIX

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CrR 3.1(f) Services Other Than a Lawyer.

(1) A lawyer for a defendant who is financially unable to obtain investigative, expert or other services necessary to an adequate defense in the case may request them by a motion to the court.

(2) Upon finding the services are necessary and that the defendant is financially unable to obtain them, the court... shall authorize the services. ....

(3) Reasonable compensation for the services shall be determined and payment directed to the organization or person who rendered them upon the filing of a claim for compensation supported by affidavit specifying the time expended and the services and expenses incurred on behalf of the defendant, and the compensation received in the same case or for the same services from any other source.

CERTIFICATE OF SERVICE

Jordan McCabe certifies that opposing counsel was served electronically via the Division II portal: sasserm@co.cowlitz.wa.us

Susan I. Baur, Cowlitz County Prosecutor
baurs@co.cowlitz.wa.us

A paper copy was deposited in the U.S. mail, first class postage prepaid, addressed to:

Charlie W. Dodd DOC #350239
Stafford Creek Corrections Center
19 Constantine Way
Aberdeen, WA 98520

Jordan B. McCabe Date: November 18, 2011

Jordan B. McCabe, WSBA No. 27211, Bellevue, Washington

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